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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CROCKER NATIONAL BANK,
Appellant,

v.

PAUL PERDUE,
Appellee.

On Appeal from the Supreme Court of the State of California

Brief of Amicus Curiae City National Bank In Support of Appellant Crocker National Bank

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE CITY NATIONAL BANK	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	12

TABLE OF AUTHORITIES

Cases Page

Perdue v. Crocker National Bank, 38 Cal.3d 913 (1985) 11, 12

Federal Statutes and Regulations

12 U.S.C.
24(7) 5
484 5
12 C.F.R.
7.8000 2,6,9,11

Public Laws

Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 4
The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L.No. 96-221, 94 Stat. 132 4

Congressional Materials

Competition & Conditions in the Financial System, Part I: Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs 97th Cong., 1st Sess. (1981) . . . 4
S. Rep. No. 363, 96th Cong., 23d Sess. (1979) 5

State Statutes

Uniform Commercial Code 4-104 . . . 8
California Civil Code §1719 9
California Penal Code §476a 9

INTEREST OF THE AMICUS CURIAE CITY NATIONAL BANK

Amicus curiae, City National Bank ("CNB") is a national bank. It presently offers deposit accounts to the general public at rates published and made known through its Schedule of Rates and Charges, set in accord with the Regulations of the Comptroller of the Currency. (As a national bank, CNB is subject to the authority and regulations of the Comptroller of the Currency.) CNB is directly affected by the decision below as it faces conflicting instructions from the California Courts and the Comptroller with respect to pricing of services. The California Supreme Court, by its decision, requires review and modification, in state court proceedings, of the price terms on which CNB may offer deposit accounts to its customers. These price terms may be contrary to those set by the Comptroller (and in fact must be different given the conditions trial courts are directed to consider).

CNB is concerned with the conflict between its obligations under the Comptroller's regulations and examination procedures, especially 12 C.F.R. 7.8000 (1985), and state court-ordered repricing of banks's services. Review is essential to establish the fact of federal preemption ignored by the California Supreme Court.[1]

SUMMARY OF ARGUMENT

The California Supreme Court, by its ruling, would make trial courts, rather than the marketplace, final arbiters of pricing in "oligopolistic" industries, including the banking industry. The Court's ruling is particularly inappropriate in the case of national banks which have been engaged in fierce competition since deregulation, and yet have also remained strictly governed by the rulings of the Comptroller of the Currency.

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[1] Pursuant to Supreme Court Rule 36.2, amicus curiae CNB has obtained the written consent of counsel of record for all parties hereto to the filing of this brief.

There has been federal preemption of the regulation of national banks by Congress. The duties of regulating the industry have been passed to the Comptroller of the Currency. Especially in light of the Comptroller's specific ruling with respect to charges assessed in the case of checks drawn against insufficient funds, the California Supreme Court overstepped its jurisdiction. The California Supreme Court should have acknowledged federal preemption and deferred ruling. To enable national banks to follow the mandates of deregulation set by Congress and the specific directives of the Comptroller, the Supreme Court should grant review.

ARGUMENT

This case comes before the United States Supreme Court at a time when banks and the banking industry are working to meet society's needs as determined by the marketplace. After decades of complacency, consumers, banks, and finally

Congress grew dissatisfied with the limits of regulation. The Depository Institutions and Monetary Control Act of 1980, Pub. L.No. 96-221, 94 Stat. 132 and the Garn-St. Germain Act of 1982 (the "Acts") were the result of renewed interest in applying market economics to banking.

A purpose of the Acts was to remove regulations enacted in the mistaken belief that they would protect the public. Congress concluded, after review, that the very statutes and regulations enacted to protect the public injured many as few earned competitive rates of interest. Competition and Conditions in the Financial System, Part I: Hearings Before the Senate Committee on Banking, Housing and Urban Affairs, 97th Congress, 1st Sess. 51, 55 (1981). Banks also suffered as depositors withdrew their savings and placed them in unregulated, uninsured accounts at higher rates of interest.

Tied to an expectation of higher interest rates on deposits was the realization that services would

bear their fair proportional costs. ("It seems clear that if institutions are going to pay higher interest rates . . . that institutions are going to have to charge more for the services they offer. . . ." S. Rep. No. 363, 96th Cong., 23d Sess. (1979).) Low interest rates would no longer be available to subsidize services.

This new era of "deregulation" did not mean "no regulation." The Comptroller of the Currency was and is charged with regulating and monitoring national banks. (12 U.S.C. §24(7) and 12 U.S.C. §484.) Banks and banking remain the subject of strict scrutiny in a pervasive sphere of federal regulation.

Into this purview would step an interloper, an outsider, the California Supreme Court. The Supreme Court of California would impose a trial court's determination of "fair and reasonable" charges in place of fees set by the marketplace, Congress and the Comptroller of the Currency.

Under Perdue, banks would be subject to litigating each pricing factor at the whim of any consumer who might, without data or documentation, allege the charge "unreasonable."

The Comptroller of the Currency is charged with regulating and monitoring the conduct and practices of national banks. In accord with its duties, the Comptroller promulgated 12 C.F.R. 7.8000. That section outlines the criteria to be used by national banks when setting various service charges, and particularly those assessed against writers of NSF checks.

One criterion is cost. Checks are usually processed electronically with a minimum of human contact. NSF checks processed at City National Bank require extensive, expensive additional handling. Normally a check, after having been micro-encoded with the amount, is posted by computer to the customer's account. A check will post only when there are sufficient funds to pay the item. After the com-

puter unsuccessfully tries to post an NSF item to the customer's account, the check is posted instead to a reject report.

Reject reports are prepared for each branch and sent, with the NSF items, by internal mail to the respective branch. At the branch, an officer reviews the rejected items report and each posted item to determine whether the check should be paid or returned unpaid. In evaluating a rejected item, the officer reviews the customer's past account history and number of past rejected items. The officer may attempt to call the customer to request a deposit to cover the check.

All NSF checks to be paid are batched together at the branch. The separate NSF batch is then returned to the computer center and encoded with a special transaction code to force the item to post NSF.

All checks to be returned NSF are so stamped, separated according to the payee's bank and bundled. Tape totals are run of each bundle. Bundles and tapes are then returned to the computer center. At the computer center, checks received from all branches are combined by payee's bank, added again, balanced and taken to the clearing house to be traded that evening during bank settlement.

Time is of the essence during these transactions as a bank is deemed to have finally paid an item if it is not returned by midnight of the next banking day. (Uniform Commercial Code §4-104.) As is evident from the outline above, the time required to and attendant costs of processing a check drawn against insufficient funds are substantial. High fees are cost-justified.

A customer unwilling to pay the high cost of presenting NSF checks simply need not write checks against insufficient funds. In the alternative, a customer may obtain overdraft protection in the

form of a loan which automatically funds upon presentment of checks drawn against insufficient funds. (Normal loan-qualifying requirements apply.) The writing of NSF checks is not required and is in fact discouraged. NSF check fees need not be incurred.

NSF checks serve no legal purpose. In California, it is a crime punishable by imprisonment to knowingly with fraudulent intent write a check against insufficient funds (Cal. Penal Code §476a). Futhermore, issuing an NSF check subjects the maker to mandatory punitive damages if payment is not made after written demand. (Cal. Civ. Code §1719.) It is not unreasonable to charge a customer with knowledge and proper management of his financial affairs and to expect the individual to act responsibily.

Responsible management of one's financial affairs was of particular concern to the Comptroller of the Currency. Under 12 C.F.R. 7.8000, banks

are instructed to go beyond mere cost plus profit pricing, particularly in the case of NSF check writing. Banks are also to price services to deter misuse by their customers. With respect to writing checks against insufficient funds, the regulation provides:

> "Certain deposit account services provided by banks, such as the honoring of checks drawn against non-sufficient funds, have the potential for misuse. It has been the Office position that service charges should discourage customers from frequently writing checks in amounts greater than their account balances."

Thus, national banks are faced with a clear directive from their regulating agency to fix charges at a rate which will deter customers from writing NSF checks.

City National Bank has complied with the Comptroller's directives. However, in Perdue, the California Supreme Court directs its trial courts to "consider not only the market price, but also the cost of the goods or services to the seller [citations], the inconvenience imposed on the seller [citations], and the true value of the produce or service [citations]" when setting reasonable prices for NSF fees and other bank services. (Perdue v. Crocker National Bank 38 Cal.3d 913, 927 (1985).)

The California Supreme Court ignores the fact that the market takes into consideration the very elements the trial court is to evaluate. It also appears unconcerned with the effect on banks such interference would have: on the mere allegation of a cost disproportionate to charges, a bank would be subjected to lengthy, costly litigation. Into normal business management is added a large unknown: the opinion of a trial court.

There is the further problem of an actual conflict between the Comptroller's directive of 12 C.F.R. 7.8000 and the California Supreme Court's ruling. Under the Comptroller's ruling, national banks are directed to assess fees in excess of market rates where necessary to discourage misuse of services, including NSF check writing. Under Perdue, national banks may be required to charge below-market rates to satisfy a trial court's sense of "fair dealing." National banks are faced with an impossible situation.

CONCLUSION

The conflicts inherent in the Comptroller's ruling and the California Supreme Court's decision mandate review. Without review, national banks are faced with deciding whether to follow the directives of their regulating agency or of the highest court in the state in which they do business. This decision directly affects CNB and all national banks doing business in California. For this

reason, amicus City National Bank respectfully urges this Court to address the merits of this appeal.

Respectfully submitted,

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